

In Re: NEW ORLEANS GRILL, INC.)
)
PERMIT NO. RR45-05401)

Applicant New Orleans Grill, Inc. (NOG) filed a timely appeal of the Lake County Local Board (Local Board) decision to deny an application for transfer of a Type 210 permit. To accommodate the large number of witnesses and interested parties, the appeal hearing was heard over two days on June 20, 2002 in Indianapolis, Indiana and October 28, 2002 in Hammond, Indiana. ¹

The Local Board recommendation is proper, and supported by substantial evidence. The appeal of New Orleans Grill, Inc. should be denied.

Applicant NOG is an Indiana corporation formed to provide food and alcoholic beverages adjacent to an adult entertainment business called the

1

“Industrial Strip.” Those companies share common ownership and management. The dancers/entertainers from the Industrial Strip would also entertain in the NOG, though only when properly clothed, while patrons would move between the businesses through separate exterior doors. “Nude dancing,” exhibition dancing or “semi-nude dancing” would be provided only in the Industrial Strip part of the structure.

The central question in this appeal is whether the recommendation to deny NOG’s application should be upheld. The Commission is required to uphold a local board determination unless the decision is found to be unsupported by substantial evidence, contrary to a constitutional right or privilege, arbitrary and capricious, an abuse of discretion, without observation of legal procedure, or in excess of or contrary to a statutory right. The record supports no basis on which to overturn the Local Board recommendation.³

Objection by local residents, and others to the NOG application is substantial. Many of the remonstrators in this proceeding also objected to the permit in *Déjà vu Showgirls of Hammond, Inc.*, RR45-19284.⁴ Though the NOG and *Déjà vu* appeals, respectively, involve case-specific issues, the proceedings shared markedly similar questions of law and fact centered largely on the need for the proposed services, and the desire for those services within the community and neighborhood. The Local Board determination of those case-specific issues in this case is supported by substantial evidence.

³ NOG’s objection to the admission of an undercover surveillance tape allegedly made at the Industrial Strip is sustained. The Hearing Judge did not consider the video or its contents. NOG’s objection to the written statement of Joseph Hero is overruled. Mr. Hero’s statement is admitted.

⁴ The Commission denied the *Déjà vu* appeal.

The Applicant attacks the validity of the Local Board action on several fronts. The first attack is aimed at the sufficiency of the evidence. The NOG erroneously maintains that “no evidence” was presented against the “establishment of a restaurant at the permit location.” (*Applicant’s Legal Argument*, 14) On the contrary, the record demonstrates repeatedly and consistently that the Local Board received at least substantial evidence to deny the application *for an alcohol permit*, based on the lack of need for the services, and the lack of desire within the community to receive the services. The Applicant argues, “the remonstrators produced no evidence refuting the need for the *restaurant services*” or evidence “refuting the desire for (sic) the neighborhood or the community to receive the *restaurant services* at the proposed location.” *Id.* 9. (Emphasis supplied.) This semantics-based argument is appurtenant to the Applicant’s untenable position that the Commission is limited to investigating “the facts of the application,” and that the Commission may not, in this case, examine “the rumors and slander from political remonstrators, who lived outside the protected area.”⁵

The Applicant’s contention that the Commission is limited to the ‘four corners’ of an application for a ‘restaurant permit’ is patently incorrect. The Commission is required to determine the desirability of an alcohol permit based on numerous factors, and to determine, ultimately, whether the issuance or transfer of a permit is in the public’s best interest.⁶ The Commission may consider a permit

⁵ Applicant’s reference to persons from “outside the protected area” is inconsistent with the submission of petitions favoring the application signed extensively by persons residing outside Hammond and Lake County, Indiana. Applicant also called at least two Illinois residents in it favor. Moreover, Applicant does not specify the ‘rumors’ or ‘slander’ in the record. This decision here is based on admissible evidence.

⁶ I.C.7.1-3-19-10.

transfer in light of the proposed geographic location, the need for the proposed services, and the desire of the neighborhood or community to receive the proposed services.⁷ In fact, the record contains considerable evidence on the desirability and/or need for the proposed alcohol permit at the location.⁸ The Local Board is required to support its decision with substantial evidence. Fact-finders, such as the Local Board, are permitted and, indeed, required, to weigh the evidence presented, crediting that evidence deemed appropriate, based in part on the opportunity to observe and evaluate the witnesses' demeanor. Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. Though the Applicant may wish a stricter, higher evidentiary standard to apply, the Local Board determination in reference to this case was properly founded.

The Applicant also challenges the Local Board recommendation on other, constitutional grounds. NOG first claims that it was denied its 'First Amendment' right to "free speech" and to "due process of law and equal protection under the law" by the application denial. The Applicant states, "a liquor license cannot be a tool to silence First Amendment Rights. (Sic) The (Commission) cannot say that a license can or cannot be granted because of either a person's religion, race or sex, or because one exercises his constitutional right to free speech." *Id.* at 17. This rather broad constitutional challenge is based on some remonstrators' personal

⁷ The proffered limitation of the Commission role would marginalize the location of any proposed permit, including that sought by the NOG. However, the co-location of the permit with the Industrial Strip, which shares common ownership, management, personnel and mailing address with the Applicant, while not necessary to the disposition of the appeal, will be addressed later in the decision.

⁸ Applicant's referral to the Type 210 permit as a 'restaurant' permit is unavailing. This appeal concerns the transfer of an alcohol permit. Assuming that it complies with local zoning laws, NOG could yet operate a restaurant as planned.

objection to adult entertainment, or nude exhibition dancing in the community. The challenge ignores, however, the significant, credible evidence that the community does not desire, or need the services proposed by the permit. The Commission need not reach the constitutional issues that the Applicant raises, given the record at hand, which demonstrates that the Local Board acted on substantial evidence. The NOG and Industrial Strip are free to exercise the full panoply of First Amendment rights despite the outcome of this appeal.

The NOG makes two additional constitutional claims to justify the reversal of the recommendation: that it was denied due process by the Local Board refusal to allow cross-examination of remonstrators at what it terms the “contested hearing,” and, further, that the Local Board’s refusal to continue the initial public hearing to respond to, or to interview the “unanticipated remonstrators” also denied it due process.

Both claims of due process violations are insubstantial. The Local Board proceeding is an administrative investigation of a permit application in which cross-examination of interested parties or remonstrators is not required.⁹ It is not an adversary proceeding. The Applicant was not denied ‘due process’ by the Local Board refusal to allow cross-examination. As for the Applicant’s due process claim based on a refusal to continue the local investigation, a request for continuance is left to the discretion of the decision maker. The denial of a continuance is grounds for relief only when the granting authority abuses its discretion by acting, without any consideration of the facts circumstances, and without any basis that might lead a reasonable person to make the same decision. Here, the Local Board public

⁹ I.C.7.1-3-19-8.

investigation of the NOG application was well noticed, and numerous remonstrators appeared to testify. A continuance would have inconvenienced many individuals, and unduly delayed the proceedings. Additionally, there has been no showing of how the NOG was prejudiced by the continuance denial; the Applicant had ample time to prepare for the public investigation given the prior continuances, and, in all reality, should have anticipated the appearance of remonstrators. Under the circumstances, one cannot say that the Local Board abused its discretion in denying the Applicant's request to continue the proceeding.

One final, broad issue raised by the NOG merits discussion. The Applicant goes to some length to differentiate itself, and the Industrial Strip, as "distinct and separate legal entities," and claims that NOG seeks merely to establish a restaurant in the same building with the adult club. For this reason, the argument goes, only evidence of the desirability, or need for a restaurant permit at the proposed location should have been considered in these proceedings. In this argument, however, the Applicant fails to reconcile two important facets of this case. First, there is substantial, and, in fact, ample evidence that the community neither desires nor needs the alcohol permit services proposed by the Applicant.

Additionally, the Commission is not as limited in its power to investigate permit applications, as the Applicant desires. The Commission has the power to prevent a part of the premises connected with, or in any way used in connection with, a licensed premises from being used as a subterfuge or means of evading the provisions of I.C. 7.1 or 905 I.A.C. A permittee is barred from knowingly allowing a person to appear in a state of nudity, as defined, on "licensed premises." Licensed premises are "a building or part of a building in which alcoholic beverages

are ... kept, manufactured, or sold.”¹⁰ There is no question that the Applicant, and the Industrial Strip would share a building, and that the Industrial Strip offers nude exhibition dancing. The NOG maintains, however, that the Commission rule barring nude dancing on licensed premises is not implicated because the respective operations are clearly differentiated by separate corporate existence, and because the physical layout of the location separates the operations. The NOG does have a separate corporate existence from the Industrial Strip. The Applicant also introduced the building plans submitted as part of the application to show that the NOG and the Industrial Strip would be separated by a wall that requires patrons to pass from the licensed premises to the Industrial Strip side by exiting the building exterior, and re-entering through a separate entrance.¹¹ Admittedly, merely having common ownership and management, and locating the NOG adjacent to the Industrial Strip are not *per se* grounds to conclude that a subterfuge could result from granting the permit. However, it appears that Commission rules would be violated based on the fact that the NOG and the Industrial Strip are, or would be located at the same address. The NOG applied for a permit to be located at 3626-B Calumet Avenue, Hammond, Indiana. The Industrial Strip’s address is 3626 Calumet Avenue. At the Commission’s request, the Indiana Excise Police investigated the allegedly separate addresses, and confirmed that the address 3626-B Calumet Avenue does not exist in the records of the U.S. Postal Service in Hammond, Indiana. Mail service is provided only to the single address at 3626

¹⁰ 905 I.A.C. 1-16.1-3(a)(2)

¹¹ Applicant’s testimony is that the firms would have common ownership and management, one admission fee for both locations, common entertainers, and similar facilities. The dancers/entertainers would/could go to the NOG from the Industrial Strip (not necessarily through the patrons’ exterior doors) when appropriately clothed. Barrett testimony, Hrg. Tr. 14-32.

Calumet Avenue. The proposed licensed premises would, therefore, be located at the same address as a business providing nude exhibition dancing. Internal walls and separate corporate existence notwithstanding, the location of the licensed premises with Industrial Strip could supply the means to evade Commission rules. Though not dispositive of, or necessary to, the resolution of the appeal, the inference that granting a permit to the NOG would violate 905 I.A.C. 1-16-3 supports a conclusion that reversing the Local Board recommendation is not in the public's best interest.

The following findings of fact are in addition to, and in furtherance of, the expanded factual findings above.¹²

FINDINGS OF FACT

1. The Lake County Local Board (Local Board) voted 3-1 at a public hearing to deny the Type-210 permit transfer application of New Orleans Grill, Inc. (ATC file; LB Tr.)

2. Proper notice of the Local Board hearing was provided to all parties and remonstrators. (ATC file)

3. The Commission upheld the Local Board denial of NOG's application.

4. New Orleans' appeal of the decision to deny the transfer was timely. (ATC file.)

5. The Hearing Judge conducted a *de novo* hearing over two days in Indianapolis and Hammond. The Applicant and interested parties were afforded a

¹² Applicant's additional arguments concerning 1) the appearance and testimony of local officials at the Lake County investigation and appeal hearing, and 2) the absence of certain administrative records were not sufficiently developed for consideration here.

full opportunity to present witnesses and evidence on the issues involved in the proceeding.

6. Persuasive, credible and substantial evidence that the community and neighborhood did not desire nor need the services proposed by the permit application supports the Local Board's action. The board was presented with perhaps conflicting evidence on certain matters related to the permit application. However, a fact-finding, investigative body is permitted to accept or reject, and credit or weigh the evidence presented to it so long as it does not act in an arbitrary or capricious manner. Based on the record at hand, the Hearing Judge has no problem concluding that the Local Board acted reasonably in reaching its recommendation. (LB Tr.; ATC file; Moyer; Dowling; Dillon; Farrell; Badnarik; Dalach; Kalwinski).

7. The Commission has investigated and considered the application of the New Orleans Grill, Inc. for a permit transfer in regard to its proposed geographical location, the need for such services at the proposed location, the desire of the neighborhood or community to receive such services, and the impact of the proposed permit location on the community and neighborhood and, as applicable, on area businesses. (LB Tr.; ATC file)

8. Substantial evidence on the record as a whole supports the Local Board action to deny the application on the grounds that the neighborhood and community do not desire the proposed services, and that there is no need for the proposed services. (LB Tr.; Dowling; Moyer; Dalach; Kalwinski)

9. The quota for Type-210 permits in Lake County/Hammond is 56. There are currently 94 such permits are currently issued for premises within the city of Hammond. (ATC file; Moyer; Farrell)

10. Records from the ATC show that 22 locations serve or sell alcohol in the neighborhood or area near the site proposed for the NOG permit, most located on major thoroughfares in relative proximity to the proposed permit premises. (Id.)

11. The lack of need and/or desire for services proposed by NOG is supported by evidence that the population of Hammond has decreased over the last decade, while the number of ATC permits for Lake County has increased. (LB Tr.; Dowling; Kalwinski; Farrell; *World Almanac and Book of Facts, 2002*)

12. Joseph J. Kovera is the majority owner of the NOG and the Industrial Strip. It is his intention to locate NOG in the same building as the Industrial Strip, albeit with separate entrances. (Kovera; Barrett)

13. Jason Barrett is the General Manager of the current Industrial Strip. If the NOG permit were to be granted, he would act as the General Manager of both facilities, splitting his days and work between “the two clubs.” Barrett acknowledges that both operations would have private, closed or “VIP rooms” but that no nudity would be allowed in the New Orleans Grill side of the building. Surveillance cameras monitor most, but not all rooms in the Industrial Strip and a similar arrangement is planned for New Orleans Grill. (Barrett; Kovera)

14. The sharing or splitting of duties that Mr. Barrett anticipates would be consistent with other, anticipated joint or cooperative measures between the Applicant, as the permit holder, and the Industrial Strip. For instance, one

admission fee would admit patrons to both parts of the common building; dancers from the Industrial Strip visit or entertain in the NOG, albeit with “more clothes”; and both the NOG and the Industrial Strip would have VIP rooms for private entertainment. (Barrett; Kovera; ATC file)

15. Several remonstrators testified as to their dislike of adult entertainment businesses or strip clubs in Hammond or Lake County in general. Several, but not all, of the same remonstrators provided evidence for the lack of need and desire for additional alcoholic beverage permit services in the community. (LB Tr.; Swiger; Dowling; Howard; Schreiner; Horak; Kalwinski; Dillon; Farrell; Delach)

16. The action of the Local Board was validly premised upon, and supported by substantial evidence of a lack of need, and a lack of desire for the proposed services in the community. The evidence relative to these issues is such that a reasonable mind would accept it as adequate to support a conclusion. (LB Tr.; ATC file; Dowling; Farrell; Dalach; Moyer; Swiger; Badnaric; Kalwinski; Horak)

17. The Local Board properly denied the Applicant’s motion to continue the public meeting and investigation on the permit, based on all the circumstances. The Applicant was also not prejudiced in not being permitted to cross-examine the remonstrators at the local investigation. There is no evidence to support a conclusion that the board acted in an arbitrary or capricious manner in denying the motion, or abused its discretion in doing so. The Applicant did not offer any persuasive, credible evidence of the prejudice resulting to it from the Local Board

action. The previous continuances of the public hearing allowed the Applicant adequate time to fully prepare for the hearing. (LB Tr. ATC file)

18. Placing another permit at the location proposed on Calumet Avenue could negatively impact safety in the area. The question of safety of the community was only one aspect of the evidence before both the Local Board, and Commission on appeal, relative to the lack of desirability, and need for the services proposed. (Dowling; Kalwinski; see Finding)

19. The central question in this appeal is whether the Local Board decision to deny NOG's application is legally well founded. The persuasive, credible evidence in the record demonstrates that substantial evidence supports the Board's recommendation. The evidence includes, but is not limited to, the present number of permits in the area, and in Lake County generally; and the objections of local residents to the services proposed by the permit.

20. The Hearing Judge took official notice of the Commission file to render the findings. (LB Tr. ATC file)

21. The Applicant and the Industrial Strip would be located in the same building, with the same Postal Service address. Though separate corporations, the businesses would share common ownership, common management, common entertainers who would be allowed to move between the businesses, and one admission fee would cover patrons for admission to both the New Orleans Grill and the Industrial Strip. This issue is not dispositive of the appeal as an adequate basis to affirm the Local Board recommendation based on the lack of need and/or desire for the proposed services in the community exists. However, the facts

support and inference that a subterfuge to evade the Commission rule barring nude dancing in the use of the premises could result.

22. The evidence supports a conclusion that the community and neighborhood will not benefit from the transfer of the permit. The number of active, issued permits in the area is adequate to satisfy the present desire and need of the community and neighborhood for the services rendered. Additionally, individual citizens and community organizations have worked to renew and develop the area in and around the proposed permit site with playing fields, parks and green areas. The evidence allows a reasonable person to conclude that the transfer of the permit would not benefit the neighborhood or community and, therefore, confirm that the transfer as proposed is not in the public interest.

23. The denial the New Orleans Grill permit will not prevent the opening of a restaurant adjacent to, or in the building with the Industrial Strip. There is no credible, reliable or persuasive evidence that the Applicant was denied due process by the Local Board or Commission, or that any decision by the Local Board negatively impacts the Applicant's right to free speech under the United States or Indiana Constitutions.

24. The evidence of record favors upholding the Local Board recommendation to deny transfer of the permit to New Orleans Grill, Inc.

CONCLUSIONS OF LAW

1. The Hearing Judge conducted a *de novo* review of the appeal of New Orleans Grill, Inc. on behalf of the Commission. I.C. 7.1-3-24-3(a); 905 I.A.C. 1-36-7(a); 1-37-11(e)(2).

2. An application for the transfer of a permit is investigated and treated the same as an application for an original permit. I.C.7.1-3-24-3.

3. The findings set forth above are based exclusively on the substantial, credible and reliable evidence in the record of proceedings, and on matters officially noticed. 905 I.A.C. 1-37-11(e)(2); *see* I.C. 4-21.5-3-27(d)

4. New Orleans Grill's appeal of the 3-1 vote of the Lake County Local Board to deny its application was timely. 905 I.A.C. 1-36-2(b)

5. The Commission investigated, considered and determined the permit transfer in regard to its geographical location, the need for such services at the proposed location, the desire of the neighborhood or community to receive such services, and the impact of the proposed permit location on the community and neighborhood and on area businesses. A review of the entire record supports the conclusion that the Local Board recommendation is in accordance with the statutory and administrative provisions and authority, and is legally sound. 905 I.A.C 1-27-4.

6. The Commission shall follow the recommendation of a majority of the members of a local board unless upon review of that recommendation it finds that to follow that recommendation would be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a

constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observation of procedure jurisdiction, authority, limitations or rights; (5) without observation of procedure required by law; or (6) unsupported by substantial evidence. I.C. 7.1-3-19-11 (a).

7. The 3-1 vote of the Lake County Local Board is supported by substantial evidence. Substantial evidence is such evidence which a reasonable mind might accept as adequate to support a conclusion. The evidence demonstrates that the Local Board had a reasonable basis upon which to deny transfer of the Type 210 permit to New Orleans Grill, Inc. *Roberts v. County of Allen*, 773 N.E.2d 850,857 (Ind.App.2002); *Byrd v. County of Allen*, 639 N.E.2d 320, 328 (Ind.App.1994); *Chesser v. City of Hammond*, 725 N.E.2d 926, 930 (Ind.App.2000).

8. New Orleans Grill, Inc. did not provide credible, reliable or persuasive evidence that the denial of the permit deprived it of a constitutional right to free speech, or to due process. The Lake County Local Board did not abuse its discretion, or act in an arbitrary or capricious manner when it denied the Applicant's request to continue the public meeting/investigation on the application. I.C.7.1-3-19-11(a)(2); *Roberts v. County of Allen*, 773 N.E.2d at 855.

9. Substantial evidence supports the conclusion that there is no need for the proposed services at the location. 905 I.A.C.1-27-4 (a)

10. Substantial evidence supports the conclusion that there is no desire in the community or neighborhood to receive the services proposed under the permit. *Id.*, at (b).

11. The public interest is best served by affirming the Local Board vote denying the transfer of the permit to New Orleans Grill, Inc. I.C. 7.1-3-19-10.

12. The Local Board vote to deny transfer of the permit to New Orleans Grill, Inc., was not arbitrary or capricious, or an abuse of discretion. The Board acted within its authority, and made its recommendation upon a reasonable consideration of the facts and evidence presented. *Roberts v. County of Allen, supra.*; I.C.7.1-3-19-11.

13. While not critical to, or dispositive of, the appeal, the Commission has the power to prevent a part of the premises connected with, or in any way used in connection with, a licensed premises from being used as a subterfuge or means of evading I.C. 7.1 or 905 I.A.C. The common U.S. Postal Service address of the New Orleans Grill, Inc., and the Industrial Strip, supports an inference that the transfer of the permit as proposed by Applicant could result in a subterfuge to evade 905 I.A.C. 1-16-3, and is, therefore, not in the best interest of the public. I.C.7.1-2-3-13.

14. The law supports upholding the recommendation of the Local Board to deny transfer of the Type 210 permit to New Orleans Grill, Inc.

15. The recommendation of a majority of the Lake County Local Board to deny transfer of the permit to New Orleans Grill, Inc. complies with I.C. 7.1-3-19-11(a). There is no legal reason or justification for the Commission to overturn the recommendation of the Local Board.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the recommendation of the Lake County Local Board to deny the transfer of a Type-210 permit to the New Orleans Grill, Inc. should be, and hereby is, upheld, and the appeal denied. The transfer of the permit is DENIED.

DATE: March 3, 2003

J. C. Buehler, Hearing Judge
Indiana Alcohol & Tobacco Commission

Serve:
All Parties
Remonstrators
ATC Chair and Commissioners
Lake County Local Board